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No. 91-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
INTRODUCTION	2
ARGUMENT	3
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

Aleut Community of St. Paul Island v. United States, 480 F.2d 831 (Ct.Cl. 1973) 5

Cherokee Nation v. United States, 937 F.2d 1539 (10th Cir. 1991) 2, 3, 4, 5, 7

Cherokee Nation v. United States, 948 F.2d 635 (10th Cir. 1991) 8

Cherokee Nation of Oklahoma v. United States, No. 83-306-C (E.D. Okla. 1987) 8

Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) 6

Confederated Tribes of the Colville Reservation v. United States, No. 90-5099 (Fed. Cir. April 29, 1992) 1, 2, 3, 4, 5, 6, 7, 8

Confederated Tribes of the Colville Reservation v. United States, 20 Cl. Ct. 31 (1990) 1, 2, 4, 5, 8

Gila River Pima-Maricopa Indian Community v. United States, 684 F.2d 852 (Ct.Cl. 1982) 7

Oneida Tribe of Indians v. United States, 576 F.2d 870 (Cl.Ct. 1978) 5

Snake or Piute Indians v. United States, 112 F. Supp. 543 (Ct.Cl. 1953) 3

United States v. Cherokee Nation of Oklahoma, 480 U.S. 700 (1987) 2

United States v. Rands, 389 U.S. 121 (1967) 4

Statutes:

Indian Claims Commission Act of 1946, 60 Stat. 1049 2

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PRELIMINARY STATEMENT

Petitioner submits this Supplemental Brief pursuant to Rule 15.7. On April 29, 1992, the Court of Appeals for the Federal Circuit issued an opinion in *Confederated Tribes of the Colville Reservation v. United States*, No. 90-5099 (Fed. Cir. April 29, 1992) (Opinion), which affirms in part, reverses in part, and remands in part, the Claims Court decision in *Confederated Tribes of the Colville Reservation v. United States*, 20 Cl. Ct. 31 (1990). Petitioner was unaware of the Federal Circuit's decision when it filed its Reply to the Respondent's Brief in Opposition on the following day, April 30, 1992. Because the Federal Circuit's decision bears directly on the issues in this case, and both the Petitioner and the Respondent have referred to the Claims Court decision in their arguments, Petitioner provides the following for the Court's consideration.

INTRODUCTION

The *Colville* decision involves a claim under the fair and honorable dealings clause of the Indian Claims Commission Act of 1946, 60 Stat. 1049, for "compensation for water power values of tribal lands taken in connection with the construction of the Grand Coulee Dam in the State of Washington." Opinion 1. The Claims Court concluded that this Court's decision on the Fifth Amendment claim in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987), was "extremely persuasive, if not dispositive," of the fair and honorable dealings claim. 20 Cl. Ct. 31 (1990). The Claims Court went on to conclude that: all water value interests of the Colvilles had been subordinated to the navigational servitude; the Colvilles had failed to establish an express waiver by the United States of its sovereign authority; and the ICCA did not explicitly waive "the omnipotent constitutional power" of the navigational servitude. 20 Cl. Ct. at 48.

On appeal, the Federal Circuit affirmed that the Colvilles are not entitled to compensation under the Fifth Amendment for the loss of water power values. Opinion 13. The Court stated, however, that the Claims Court's analysis was "unduly broad as it tried to sweep away a moral claim through legal analysis," *id.* at 21, because the navigational servitude is not "unquestionably dominant over other concerns." *Id.* at 22. Quoting the Tenth Circuit's decision in *Cherokee Nation v. United States*, 937 F.2d 1539, 1546 (10th Cir. 1991) (Pet. App. 15a), the Federal Circuit stated that the Claims Court erred "by failing to perform 'a judicial inquiry into the facts and circumstances' of this case in light of the moral cause of action. That inquiry must of necessity include evaluation of whether or not the Government undertook a special relationship to the Tribes." Opinion 22. Because the Claims Court had disposed of the claim on cross-motions for summary judgment, the Federal Circuit remanded the claim to the Claims Court for

> factual findings and an opinion on whether or not the course of dealings between the United States and the Colville Tribes gave rise to a special relationship or obligation with regard to the water power values of tribal lands and whether that obligation, assuming it existed, was a responsibility to the Tribes, one which the Government failed to live up to and which resulted in damages to the Tribes.

Id. at 30-31.

ARGUMENT

1. The Federal Circuit's decision in *Colville* conflicts with that of the Tenth Circuit in *Cherokee Nation v. United States*, *supra*, even though the former purports to follow the analytical requirements set forth in the latter. The Federal Circuit states that a fair and honorable dealings claim must be determined from a factual examination of the entire course of dealings between the parties. Opinion 27, citing *Snake or Piute Indians v. United States*, 112 F. Supp. 543, 552 (Ct. Cl. 1953). Consistent with that view, the Cherokee Nation had argued "vigorously" that "the entire history of its treatment by the government is relevant in connection with the fair and honorable dealings claim." Pet. App. 6a, 937 F.2d at 1542. In response, the Tenth Circuit "agree[d] that we should consider the background of statutes, treaties and any representations made to the Cherokee Nation to determine whether the requisite showing is made of a 'special relationship' as an element of the fair and honorable dealings claim." Pet. App. 7a-8a, 937 F.2d at 1543. The Tenth Circuit, however, did not do as it agreed it should; instead it severely limited the scope of its inquiry into the course of dealings to whether any facts showed a nexus to the navigation servitude and a commitment by the United States not to exercise it. As discussed in the Petition and Reply, such a showing is not required and impossible to make under the circumstances. More important, it conflicts with the test required by the Federal Circuit.

2. The Federal Circuit's decision vindicates the Petitioner's argument in this case. The Federal Circuit reversed the Claims Court decision in *Colville* because the "Claims Court dealt with the 'fair and honorable dealings' cause of action in a confusing manner, indeed without making basic, requisite fact findings necessary to determine the validity of this cause of action." Opinion 14. The Federal Circuit rejected the argument by the United States that because a claim for water power values (one of the Petitioner's claims in this case) is recognized in law or equity, it is not cognizable under the fair and honorable dealings cause of action. *Id.* at 20-21. The Federal Circuit viewed that argument as one that essentially attempts to dispose of a moral claim on the basis of a legal analysis. *Id.* at 21. The Federal Circuit concluded that the

> Claims Court's dependence on a legal analysis to attempt to dispose of a moral claim—one which existed outside the bounds of the Constitution, laws, treaties of the United States, and Executive Orders of the President—is misguided. As the Claims Court must realize, the United States can still be held liable where, even though it acts within the scope of its constitutional or legal authority, its conduct is less than fair or honorable to Indian tribes.

Id. at 21-22.

While the Federal Circuit correctly ruled that a legal defense does not lie against a moral claim, the Tenth Circuit ultimately failed to reach the same conclusion. Relying on the Claims Court's decision in Colville, the Tenth Circuit states that the navigational servitude is "extremely persuasive, if not dispositive" of the Petitioner's fair and honorable dealings claim. Pet. App. 10a, 937 F.2d at 1544. The Tenth Circuit relies on this Court's decision denying the Fifth Amendment claim in *United States v. Rands*, 389 U.S. 121 (1967), and notes favorably the Claims Court's observation (20 Cl. Ct. at 47) that the navigational servitude defense cannot be over-

come by a fair and honorable dealings claim: "Why? simply because the constitutional power to assert the navigational servitude is dominant over any and all interests when it is properly exercised through an appropriate manifestation of congressional intent." Pet. App. 10a, 937 F.2d at 1544 n.5. The Federal Circuit reversed the Claims Court on that point because the Claims Court had been "unduly broad" in its effort to "sweep away a moral claim through legal analysis," Opinion 21, and because the navigational servitude is not "unquestionably dominant over other concerns." *Id.* at 22. The reversal of that portion of the Claims Court's decision by the Federal Circuit eliminates a principal justification for the Tenth Circuit's decision.

3. The Federal Circuit's decision also illuminates the issue of the special relationship requirement of a fair and honorable dealings claim. The Federal Circuit cites with approval the separate opinion in *Oneida Tribe of Indians v. United States*, 576 F.2d 870 (Ct. Cl. 1978) which describes the origin of the special relationship requirement. Essentially, the special relationship concept was developed to account for cases in which, although "there is no contract or treaty obligation, or formal trusteeship, honor may oblige the United States to take steps to protect Indians, who have slipped into a dependence on the honor of the United States, by one means or other." *Id.* at 883 (Nichols, J., concurring in part and dissenting in part). Such a special relationship may be based on a limited record of facts and events that do not have the formal endorsement of treaties and agreements between the Indians and the United States. For example, in *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831 (Ct. Cl. 1973), the United States never intended to recognize in the Aleuts anything like the sovereignty and property rights that were recognized in the Petitioner. Congress merely authorized federal officials to look after the minimal needs of the Aleuts because of the need to keep them in service to the federal fur trade. The depend-

ency of the Aleuts having been caused by the United States, the Court concluded that the government's actions toward them entailed a corresponding duty to deal fairly and honorably with them.

In this case, there is no need to cobble together a special relationship with the United States. The Petitioner's claim is based on treaties, a fee patent, and a statutory fiduciary relationship, as well as a history of representations from federal officials, including the President, military commanders, and Indian agents, that acknowledge the Petitioner's comprehensive interest in the Arkansas Riverbed. Moreover, the claim is underlain by this Court's unique decision in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970):

> [R]eservation of the river bed [by the United States in the treaty and patent for the Cherokee domain in Oklahoma] would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects, however, the Indians were promised virtually complete sovereignty over their new lands. We do not believe that petitioners would have considered that they could have been precluded from exercising these basic o vnership rights to the river bed, and we think it very unlikely that the United States intended otherwise . . . . Indeed, the United States . . . had all it was concerned with in its navigational easement via the constitutional power over commerce.

397 U.S. at 635 (citations omitted). In the absence of compensation to the Petitioner, the Respondent cannot in fairness or honor reconcile those basic ownership rights, which this Court held Respondent had vested in the Petitioner, with Respondent's subsequent exercise of the navigational servitude.

In addition, the concurring opinion in the Federal Circuit's decision compares the Respondent's *knowing interference* in the Colvilles' interests with Respondent's *know-*

ing failure to prevent non-Indian interference with Indian water rights in *Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852 (Ct. Cl. 1982), both of which it concluded were actionable in a fair and honorable dealings claim. Opinion 11-12 (Nies, C.J., concurring). In this case, the Respondent's *ignorance* of the Petitioner's title and fiduciary-based expectations in the Arkansas River cannot excuse its obligation to have dealt fairly and honorably with the Petitioner when it constructed the Arkansas River Navigation Project.

4. The Tenth Circuit required the Petitioner to show a special relationship with a nexus to the exercise of a legal power, the navigational servitude, and prove that the United States consented to subordinate it to the Petitioner's interest. Under that test, the Petitioner is required to show that the Respondent agreed to "forego or restrict its historic rights under the Commerce Clause so that the government was inhibited in the exercise of the navigational servitude, or bound to make compensation for the results of its exercise." Pet. App. 11a, *Cherokee Nation v. United States*, 937 F.2d at 1544. That requirement is not supported by the case law and is at odds with the ruling of the Federal Circuit.

The Federal Circuit declared that a fair and honorable dealings claimant is required to prove that the course of conduct between an Indian tribe and the United States created an expectation in the tribe that would make it unfair and dishonorable of the United States to invoke a superior federal power to defeat the tribal interest. Petitioner submits that the Federal Circuit's ruling comports with the test as established in fair and honorable dealings jurisprudence. Apart from the Tenth Circuit's ruling, Petitioner is not aware of any case which requires a fair and honorable dealings claimant to prove that the United States expressly obligated itself to forego a legal right.

5. Both Petitioner's claim in the Tenth Circuit and the Colvilles' claim in the Federal Circuit were disposed of on cross motions for summary judgment. Pet. App. 26a, *Cherokee Nation of Oklahoma v. United States*, No. 83-306-C (E.D. Okla. 1987); 20 Cl. Ct. at 33. Because of the comprehensive nature of the Petitioner's interest as expressed in the treaties, fee patent and statutory trust, the Petitioner concluded that a determination of its claim was appropriate for summary judgment. The Tenth Circuit, however, summarily dispensed with the Petitioner's presentation of treaties and other evidence in which the United States recognized the need to secure rights of navigation for non-Indians and the right of Petitioner to regulate commerce in waterways under Cherokee domain. Pet. App. 22a, 948 F.2d at 637. Under the ruling by the Federal Circuit, that presentation should have signaled the existence of unresolved issues of material fact. "[T]he argument that a fair and honorable dealings cause of action could take precedence over the legal exposition of a navigational servitude depends on the facts." Opinion 28. To resolve complex issues of Indian land law and fact-intensive just compensation claims by summary judgment is error where the claim is inherently a fact question that is subject to dispute between the parties. It makes no difference that the factual dispute is raised in a moral rather than legal context, or that the parties have made cross motions for summary judgment. *Id.* In view of this ruling, the Petitioner's claim was incapable of resolution by the Tenth Circuit under summary judgment.

CONCLUSION

The Tenth Circuit's refusal to review the entire course of dealings between the Petitioner and the Respondent and the requirement that the Petitioner prove Respondent's consent to forego the navigational servitude cannot be reconciled with the Federal Circuit's decision. Accordingly, the Petition should be granted in order to reinstate Petitioner's claim, conform the Tenth Circuit's ruling to the Federal Circuit's analysis, and remand the case for an analysis of all the relevant facts regarding the fair and honorable dealings claim.

Respectfully submitted,

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